Supreme Court, U.S.
FILED
MAR 25 2005
OFFICE OF THE CLERK

No. 04-1028

In The
# Supreme Court of the United States

PEOPLE OF THE STATE OF CALIFORNIA, ex rel.
BILL LOCKYER, ATTORNEY GENERAL,

*Petitioner,*

v.

DYNEGY, INC. et al.,

*Respondents.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## PETITIONER'S REPLY MEMORANDUM

BILL LOCKYER
Attorney General of the
State of California
TOM GREENE
Chief Assistant
Attorney General
MARK BRECKLER
Senior Assistant
Attorney General
DANETTE VALDEZ
Supervising Deputy
Attorney General

TAMAR PACHTER*
PAUL STEIN
LAURA J. ZUCKERMAN
Deputy Attorneys General

**Counsel of Record*
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5607
Fax: (415) 703-5480
E-mail: Tamar.Pachter@doj.ca.gov

*Counsel for the Petitioner*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. THERE IS NO PRINCIPLED WAY TO RECONCILE THE NINTH CIRCUIT OPINION WITH EITHER *MERRELL DOW* OR *PAN AMERICAN* ..... 1

A. *Merrell Dow* Controls Removal, Whatever the Source of Original Jurisdiction ..... 2

B. *Pan American* Forecloses the Bid for Original Jurisdiction Under Section 825p... 5

II. THIS COURT SHOULD DECIDE WHETHER SOVEREIGN IMMUNITY ALLOWS THE STATES TO RESIST REMOVAL OF STATE LAW ENFORCEMENT ACTIONS..... 7

CONCLUSION..... 10

## TABLE OF AUTHORITIES

Page

CASES

*Ames v. Kansas*, 111 U.S. 449 (1884) ..... 8

*AmSouth Bank v. Dale*, 386 F.3d 763 (6th Cir. 2004) ..... 4

*Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003) ..... 4

*Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987) ..... 6

*Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) ..... 8

*Fed. Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) ..... 8

*Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983) ..... 5

*Gully v. First National Bank*, 299 U.S. 109 (1936) ..... 5

*Hans v. Louisiana*, 134 U.S. 1 (1890) ..... 8, 9

*Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ..... 8, 9

*Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908) ..... 5

*Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986) ..... 1, 2, 3, 7

*Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831 (9th Cir. 2004) ..... 4

*Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961) ..... 1, 5, 7

*Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) ..... 9

*Roddy v. Grand Trunk Western R.R. Inc.*, 395 F.3d 318 (6th Cir. 2005) ..... 4

TABLE OF AUTHORITIES – Continued

Page

*Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950) ..... 5

*Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002) ..... 3

*Thomas v. FAG Bearings*, 50 F.3d 502 (8th Cir. 1995) ..... 9

STATUTES

16 U.S.C.
§ 825p ..... 1, 2

28 U.S.C.
§ 1331 ..... 2
§ 1441 ..... 2, 3

42 U.S.C.
§ 2014(hh) ..... 4
§ 9601 *et seq.* ..... 2
§ 9613(b) ..... 2

California Business & Professions Code
§ 17200 ..... 2

The Generators oppose this petition as unworthy of review, but they fail to reconcile either *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), or *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), with the Ninth Circuit's analysis. The Generators cannot cite a single case from this Court or any other Court of Appeals to support the conclusion that a state law enforcement action can be removed to federal court under section 825p of the Federal Power Act (the "FPA"), 16 U.S.C. § 825p ("section 825p"). Further, the Generators do not begin to address the practical implications of this analysis for state law enforcement. Thus, the reasons that this Court should grant the writ remain unchallenged: the Ninth Circuit's jurisdictional analysis conflicts with decisions of this Court and the other courts of appeals, skews the balance between state and federal judicial authority in significant and highly unpredictable ways, puts state law enforcement on a collision course with the federal courts and violates the states' sovereign immunity.

## I. THERE IS NO PRINCIPLED WAY TO RECONCILE THE NINTH CIRCUIT OPINION WITH EITHER *MERRELL DOW* OR *PAN AMERICAN*.

The Generators give *Merrell Dow, Pan American,* and the opinion below a tortured reading in a bid to disguise conflicts that the Court of Appeals candidly recognized.

### A. *Merrell Dow* Controls Removal, Whatever the Source of Original Jurisdiction.

The Generators argue that *Merrell Dow* does not control because 28 U.S.C. § 1331, rather than section 825p, was the source of original jurisdiction for the state law claim removed in that case. The Generators argue that section 825p provides a "special" grant of original jurisdiction, rendering *Merrell Dow* irrelevant. Joint Op. at 9, 11. *Merrell Dow* cannot be limited in this fashion. As a threshold matter, the Court of Appeals opinion acknowledges that under *Pan American*, section 825p is *not* a source of original jurisdiction.[1] Pet. App. at 21a, fn. 10. Further, the propriety of removal under 28 U.S.C. § 1441 was precisely the issue before the Court in *Merrell Dow*. 478 U.S. at 808. Whatever source of "original" jurisdiction the Generators try to invoke, the requirements of the removal statute must be met, as set forth in *Merrell Dow*.

The Generators' contention that federal law (in the form of a tariff violation) is "essential" to the Business & Professions Code section 17200 ("section 17200") cause of action here in issue is not based upon the pleading requirements of California law, which provides the relevant standard under the well-pleaded complaint rule. *See* Pet. at 10. This argument is based on a myth that all legal rights and obligations with respect to the transactions at issue in these cases stem exclusively from the ISO tariff

[1] In addition, section 825p does not resemble statutes in which Congress has clearly made a special grant of jurisdiction that is both original and exclusive. *See, e.g.*, 42 U.S.C. § 9613(b) (part of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq.).

*See, e.g.*, Joint Op. at 10, 14, 17. But the ISO tariff no more created the sale of reserve generation capacity (or "ancillary services," as it is called in the tariff) than it created the sale of electric power. These sales long predated both deregulation and the ISO tariff.[2] Similarly, law enforcement of state fraud and unfair competition laws arising from double selling of reserve generation capacity is neither intrinsic to nor dependent upon the tariff. In any event, the myth that the tariff is "essential" does not help the Generators reconcile the opinion with *Merrell Dow*, which bars removal because the FPA provides no federal right of action.

The attempt to distinguish these cases from *Merrell Dow* on the grounds that the FPA provides an administrative remedy also fails. *See* Joint Op. at 14. The right of removal is purely a creature of statute and is to be strictly construed. *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002). The mere existence of an administrative remedy does not indicate that Congress intended to provide a federal cause of action that could form the basis for the exercise of removal jurisdiction under 28 U.S.C. § 1441 and *Merrell Dow*. Even farther afield is the notion that the ISO tariff – which expresses the intention only of the market participants and the Federal Energy Regulatory Commission ("FERC") – could form the basis for the exercise of federal removal jurisdiction. A tariff, though it

[2] Before deregulation, California's utilities provided reserve generation capacity to themselves and purchased the balance of their requirements through bilateral contracts with other utilities. The ISO now buys that capacity for the utilities through a centralized auction process. But reserve capacity is still reserve capacity and a promise to hold capacity in reserve without any intention of holding capacity in reserve is still fraudulent under state law.

has the force of federal law, cannot expand federal subject matter jurisdiction, either directly or by implication. *See, e.g., Roddy v. Grand Trunk Western R.R. Inc.*, 395 F.3d 318, 326 (6th Cir. 2005); *AmSouth Bank v. Dale*, 386 F.3d 763, 776-777 (6th Cir. 2004) (and cases cited therein); *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 836 (9th Cir. 2004).

The Generators fundamentally misstate the issue. The California Attorney General does not contend that Congress lacks the *power* to authorize removal of purely state law claims. As this Court pointed out in *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), Congress has the power to authorize removal of state law claims when it completely preempts state law by: 1) providing an exclusive federal cause of action for the claim asserted; and 2) setting forth procedures and remedies governing that cause of action. 539 U.S. at 8. There is no contention, however, that the FPA completely preempts state law enforcement. In addition, Congress has the power to authorize removal of purely state law claims even when it does not provide a federal cause of action. *See id.* at 6 (citing the "unusual pre-emption provision" in the Price-Anderson Act, 42 U.S.C. § 2014(hh), "that not only gives federal courts jurisdiction over tort actions arising out of nuclear accidents but also expressly provides for removal of such actions brought in state court even when they assert only state law claims.") Unlike the Price-Anderson Act, however, section 825p of the FPA does not expressly authorize removal of purely state law claims. Plainly, Congress knows how to authorize removal of state law claims, but it did not do so in section 825p.

### B. *Pan American* Forecloses the Bid for Original Jurisdiction Under Section 825p.

The Generators argue that *Pan American* does not conflict with the opinion below because it is not a removal case. Joint Op. at 15. The weakness of this argument is apparent. In *Pan American,* the defendants challenged the jurisdiction of a state court over state law claims on the basis of an exclusive jurisdiction clause in the Natural Gas Act. The Court held that clause, virtually identical to section 825p, is not a source of original jurisdiction. *Pan American,* 366 U.S. at 664. The procedural distinction makes no difference because the legal issue decided is the same.[3]

The Generators' argument ultimately concedes the point made in the petition: federal jurisdiction under section 825p, if it exists, stands outside this Court's paradigm for removal of state law claims. Their argument boils down to this: a state law enforcement action that can be characterized as relating to a FERC tariff is removable under section 825p even though pleading the state law claim does not necessarily depend on a tariff violation, even though Congress has provided no federal cause of action, and even though section 825p does not explicitly authorize removal of state law claims. This expands

---

[3] Further evidence that this procedural distinction is irrelevant is found in the *Pan American* Court's reliance on removal analysis to decide the case. *See* 366 U.S. at 662-665 (citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Gully v. First National Bank*, 299 U.S. 109 (1936); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908)). This Court has also referred to *Pan American* as a removal case. *See Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 10 n.9 (1983).

removal jurisdiction for purely state law claims beyond the parameters this Court has tolerated even in the context of complete preemption. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 394-399 (1987). There is no doubt that the Ninth Circuit's opinion significantly expands removal jurisdiction and demands this Court's review.

The Generators grossly overreach when they suggest that by not addressing the merits of the case as a whole in this petition, the Attorney General has conceded the futility of the underlying actions.[4] Joint Op. at 1, 8-9. Omitting an issue in a petition for certiorari is not an admission of futility. This petition argues that under our federal system of government, the merits of the Generators' defenses were for the state court to decide. If the Court grants this petition and reverses for lack of subject matter jurisdiction, the Ninth Circuit's decision on the merits of the underlying actions will be void in any event, and the Generators will have a full opportunity to argue

---

[4] The Generators' discussion of the so-called "regulatory background" of this petition is a poorly disguised attempt to persuade the Court of their defense on the merits of the underlying actions. See Joint Op. at 1-4. Moreover, this discussion is riddled with misrepresentations. The claim that FERC settled double selling claims against Reliant and Dynegy with "significant participation by Petitioner" is highly misleading. *See id.* at 3. Reliant and Dynegy entered into proposed settlement agreements with FERC trial staff with virtually no input from the California Attorney General. FERC then approved those agreements, after refusing to hold a hearing that would have allowed the California Attorney General to meaningfully challenge any aspect of those agreements. The Generators' claim that the settlement payments made by Reliant and Dynegy "derived" from analyses supplied by the California Attorney General is also highly misleading. *See id.* at 3-4. In fact, the California Attorney General argued that the settlement amounts FERC approved represented only a small fraction of Reliant's and Dynegy's illegal gains.

their defenses in state court. If the Court does not grant the petition, the published opinion of the Ninth Circuit will stand in conflict with *Merrell Dow* and *Pan American*, inviting new decisions that will further erode this Court's jurisprudence limiting removal of state law claims, and will put the sovereign immunity of the states squarely in play. There is more than enough here at stake to warrant this Court's review.

## II. THIS COURT SHOULD DECIDE WHETHER SOVEREIGN IMMUNITY ALLOWS THE STATES TO RESIST REMOVAL OF STATE LAW ENFORCEMENT ACTIONS.

None of the cases the Generators rely upon supports the categorical conclusion that where a state is a plaintiff, this Court has "adhered to the language of the Eleventh Amendment and held for nearly 200 years that no immunity is available." Joint Op. at 21. The fact that many sovereign immunity cases decided to date involve lawsuits against a state merely reflects the reality that often these are the cases involving the highest stakes, and the ones to which states choose to dedicate resources. It is a mistake to infer from this, as do the Generators, a bright-line rule against sovereign immunity in all cases where states are plaintiffs. As this Court has held, shielding state treasuries is but one function of sovereign immunity: "the doctrine's central purpose is to accord the States the respect owed them as joint sovereigns. It is for this reason, for instance, that sovereign immunity applies regardless of whether a private plaintiff's suit is for monetary damages

or some other type of relief."[5] *Fed. Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743, 765 (2002) (citations and internal quotation marks omitted).

The specific issue presented here – whether sovereign immunity bars involuntary removal of state law enforcement proceedings – has not been "settled by a consistent line of authority from this Court and the courts of appeals," as the Generators claim. Joint Op. at 20. The Generators misread the three cases on which they rely: *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Ames v. Kansas*, 111 U.S. 449 (1884); and *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

*Cohens* did not address removal at all: it held only that the Supreme Court had appellate jurisdiction to review the final judgment of the highest court of a state in a suit between a state and one of its own citizens, because such appellate review is not a "suit" within the meaning of the Eleventh Amendment. *Cohens,* 19 U.S. (6 Wheat.) at 412. Similarly, state sovereign immunity was not at issue in *Ames*. This explains why the Court did not cite *Ames* in *Hans v. Louisiana*, 134 U.S. 1 (1890), a sovereign immunity case the Court decided only six years later. There is no indication in *Ames* that the State of Kansas either challenged removal as a general matter or raised sovereign immunity as a bar to removal. Rather, Kansas contended the case should have been removed to the Supreme Court, under its Article III original jurisdiction, rather than to the inferior circuit court. *See* 111 U.S. at 469-472;

---

[5] As *amici* point out, forcing the state into federal court via removal leaves it subject to the issuance of orders against it that could affect the state treasury. *See* Amicus Brief at 17.

*Illinois v. City of Milwaukee*, 406 U.S. at 100-101.[6] Finally, *Illinois* was not a removal case, and involved no sovereign immunity issues. The Court merely adhered to *Ames*'s holding that suits brought by a state against another state need not be brought in the Supreme Court. *Illinois*, 406 U.S. at 101.

Further, the Generators' effort to reconcile the conflicting decisions of the Courts of Appeals fails. The reasoning of *Thomas v. FAG Bearings*, 50 F.3d 502 (8th Cir. 1995), cannot be reconciled with the decision below, or with the other lower court cases that categorically refuse to consider sovereign immunity in cases where the state is a plaintiff.

Finally, the Generators' claim that the decision below does not pose a threat to state sovereign interests simply restates their jurisdiction argument and is belied by the arguments advanced by the 19 *amici* states. But as one Justice of this Court recognized, "[w]hether the assertion of an Eleventh Amendment claim is well founded . . . is a question separate from the question whether the Eleventh Amendment interests are 'too important to be denied review. . . .'" *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 148 (1993) (Blackmun, J. concurring; citation omitted). If the Ninth Circuit's jurisdictional analysis under section 825p is correct, only sovereign immunity can preserve the states' authority to enforce their own laws in their own courts.

---

[6] Although the holdings in *Cohens* and *Ames* are still good law, the dictum in these cases on which the Generators' argument depends retains no constitutional significance after *Hans*. *See Hans*, 134 U.S. at 19-21 (limiting *Cohens*).

## CONCLUSION

The petition for writ of certiorari should be granted.

Dated: March 25, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California
TOM GREENE
Chief Assistant Attorney General
MARK BRECKLER
Senior Assistant Attorney General
DANETTE VALDEZ
Supervising Deputy Attorney General
TAMAR PACHTER
*Counsel of Record*
PAUL STEIN
LAURA J. ZUCKERMAN
Deputy Attorneys General